

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**POULTRY DEFENDANTS' JOINT RESPONSE TO STATE OF OKLAHOMA'S
MOTION IN LIMINE TO PRECLUDE DEFENDANTS FROM REFERRING TO THIS
ACTION AS ANYTHING OTHER THAN "THE STATE'S" LAWSUIT**

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George's, Inc., George's Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc. (the "Poultry Defendants") and respectfully move the Court to deny the State of Oklahoma's Motion in Limine to Preclude Defendants From Referring to This Action as Anything Other than "The State's" Lawsuit (Dkt. No. 2406). In support thereof, the Poultry Defendants state:

I. Introduction

Pursuant to the State's Motion in Limine, the State seeks an order precluding the Poultry Defendants from: (1) referring to this lawsuit as "the Attorney General's lawsuit," "General Edmondson's lawsuit," or any similar phrases; and (2) referring to the party-plaintiff to this lawsuit as anything other "the State" or "Plaintiff." The State argues that references to this lawsuit or the parties involved that are inconsistent with the State's approved titles "are

inaccurate as a matter of law and represent an improper attempt to (1) characterize this lawsuit as something other than the State's lawsuit, (2) personalize this lawsuit,¹ and (3) appeal to bias" and as such, they should be precluded. The State's argument is flawed; it ignores the relevance of the evidence (or word choice) the State's Motion in Limine would preclude, overstates the alleged prejudice, and ignores the Court's ability to cure any harm involved with a limiting instruction rather than excluding the evidence under Rule 403.

II. Legal Standard

Generally, all relevant evidence is admissible. *See* F.R.E. 402. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* F.R.E. 401. Federal Rule of Evidence 403, however, allows a district court "to exclude relevant evidence when concerns over unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence." *Mendelsohn v. Sprint/United Mgmt.*

¹ What is ironic is that Attorney General Edmondson has himself personalized this lawsuit. He has made repeated public comments via the newsmedia regarding the time he spent on the Illinois River as a child and young man and the water quality changes that allegedly have occurred since that time. *See* Exh. 1, Justin Juoapavicius, *Okla. Attorney General Takes on Poultry Industry*, N.Y. TIMES, August 13, 2009, http://www.nytimes.com/aponline/2009/08/13/us/AP-US-Farm-Scene-Poultry-Lawsuit.html?_r=1&pagewanted=print (characterizing the IRW as the "centerpiece of [Edmondson's] federal lawsuit against the Arkansas poultry industry" and in which Edmondson reminisces with respect to the Illinois River, "This was our weekends."); *see also* Exh. 2, April L. Brown, *Ark. Poultry Companies Accused of Water Pollution*, USA TODAY, July 24, 2005, http://www.usatoday.com/news/nation/2005-07-24-poultry-pollution_x.htm ("[Edmondson] remembers that, as a college student in Tahlequah, Okla., he could stand chest-high in the Illinois River and still see his toes."). Additionally, even Mr. Edmondson's own press releases regarding this lawsuit give indications of his personal interest in the lawsuit. One such press release is entitled "Edmondson Says *He'll* Sue if Arkansas Breaks Talks" (attached hereto as Exh. 3) (emphasis added); another, attached to this brief as Exh. 4, is entitled "AG Sues Poultry Industry for Polluting Oklahoma Waters." Clearly Mr. Edmondson sees this lawsuit as a means to pursue his personal crusade of restoring the Illinois River to the condition he recollects from his childhood.

Co., 466 F.3d 1223, 1230-31 (10th Cir. 2006); *see also* F.R.E. 403. Excluding otherwise admissible evidence under Rule 403 "is an extraordinary remedy [that] should be used sparingly." *United States v. Roberts*, 88 F.3d 872, 880 (10th Cir.1996). "In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000) (internal quotations omitted).

III. Argument

Through their motion, the Plaintiffs are trying to force the Poultry Defendants and the Court to pretend as though the State of Oklahoma "speaks with one voice" with respect to topics such as the benefits and risks of using poultry litter as a fertilizer, the Poultry Defendants' cooperation in and compliance with the regulatory programs pertaining to poultry litter, and the presence and magnitude of other potential sources of phosphorus and bacteria in the Illinois River watershed (the "IRW"). The record in this case reveals that the Plaintiffs' views on these and other issues relevant to this case are not shared by and in fact are actively opposed by the Oklahoma officials and regulators with regulatory or environmental responsibilities related to the issues in this case. This fact is relevant to the Poultry Defendants' position in this litigation. The Poultry Defendants should be permitted to make this distinction clear during the trial of this matter, and evidence or references relating to this distinction should not be excluded under Federal Rule of Evidence 403.

Benefits and Risks of Using Poultry Litter as a Fertilizer

Throughout the depositions of Ed Fite, administrator of the Oklahoma Scenic Rivers Commission, Steve Thompson, Executive Director of the Oklahoma Department of Environmental Quality ("ODEQ"), Terry Peach, Secretary of Agriculture for the State of

Oklahoma, and James Crutcher, Commissioner of Health for the State of Oklahoma, evidence is presented which illustrates the fact that many Oklahoma officials view poultry litter as a valuable fertilizer that has not been proven to have caused many of the problems upon which Plaintiffs' allegations focus. During his deposition, Mr. Thompson testified that ODEQ has not made any of the following findings, which relate to the Plaintiffs' allegations in this lawsuit: (1) that land application of litter in the IRW may present an imminent and substantial endangerment to human health or the environment (Exh. 5, Deposition of Steve Thompson ("Thompson Dep."), 34:19-35:7); (2) that any incident of disinfection by-products in excess of regulatory limits for any water treatment system in the Oklahoma portion of the IRW was caused by use of poultry litter in the IRW (*id.* at 50:24-51:7); or (3) that levels of fecal indicator bacteria in the IRW surface waters in excess of regulatory limits was caused by operations associated with any Poultry Defendant (*id.* at 57:7-14). Mr. Fite testified during his deposition that he is not in a position to identify anyone who became ill as a result of exposure to bacteria following recreation in the IRW. *See* Exh. 6, Deposition of Ed Fite ("Fite Dep."), 101:9-19.

Terry Peach testified during his deposition that if it were cost effective for him to use poultry litter as a fertilizer on his west Oklahoma ranch, he would do so. Exh. 7, Deposition of Terry Peach ("Peach Dep."), 7:8-9. Mr. Peach discussed the benefits to land that result from the land application of poultry litter. *Id.* at 126:22-127:3, 137:18-24. He further stated that ODAFF has not exercised its statutory authority to ban all land application of poultry litter in the IRW (*id.* at 59:12-20) and that the State of Oklahoma, as represented by ODAFF with respect to matters relating to poultry litter, is satisfied with the litter application rates presently allowed in the IRW (*id.* at 66:14-25).

James Crutcher testified that, in his time with the Oklahoma Department of Health, there

has never been an outbreak or an increase in the incidence of disease in the Illinois River with which the health department has been concerned. Exh. 8, Deposition of James Crutcher ("Crutcher Dep."), 51:14-52:7. There has never been a health advisory issued by the Oklahoma Department of Health with regard to the safety of the waters of the Illinois River or its tributaries (*id.* at 55:6-12, 115:12-116:3), nor has anyone suggested to Dr. Crutcher that the Oklahoma Department of Health should issue such a health advisory for water body contact or for the consumption of groundwater from water wells in the IRW. *Id.* at 92:25-93:13.

The Oklahoma Department of Health has not identified any cluster at any time related to campylobacteriosis, salmonellosis, or *E. coli* within the Oklahoma counties in the IRW. Exh. 8, 74:3-17. In Dr. Crutcher's time at the Oklahoma Department of Health, the department has taken no action based on a belief that Adair, Cherokee, Delaware, or Sequoyah counties were experiencing a statistically elevated rate of campylobacteriosis, salmonellosis, or *E. coli*. *Id.* at 113:12-114:5. Dr. Crutcher has not seen any data, outside of affidavits produced by the Plaintiffs' retained experts, which suggest that there is widespread bacterial contamination of ground water in the IRW. *Id.* at 93:14-20. Likewise, Dr. Crutcher is not aware of data, other than affidavits produced by the Plaintiffs' retained experts, which suggests that poultry litter is causing any elevated health risk in the IRW. *Id.* at 107:18-22. Prior to the initiation of the instant lawsuit, the Oklahoma Department of Health has never been requested by any other state agency to investigate or assist in the investigation of a human health risk posed by bacteria levels in surface or ground water in the IRW. *Id.* at 110:10-17.

That the Oklahoma agencies responsible for promulgating and enforcing regulations regarding the use of poultry litter and its effects on the environment and for ensuring the public health and safety do not view poultry litter as a substance harmful to the environment or human

health is relevant to the strength and credibility of evidence that Plaintiffs may present during the trial of this matter.

Poultry Defendants' Cooperation In and Compliance with Regulatory Programs Pertaining to Poultry Litter

The depositions of Mr. Fite, Mr. Thompson, Mr. Peach, and Dr. Crutcher all contain testimony indicating that these Oklahoma officials do not believe that the Poultry Defendants or growers under contract with them have violated Oklahoma regulations regarding the use, handling, and land application of poultry litter. Mr. Fite is aware that the poultry industry is regulated in both Oklahoma and Arkansas with respect to the use of poultry litter in the IRW. Exh. 6, Fite Dep., 89:5-11. He is further aware of only one instance in which a poultry grower violated state laws or regulations governing the use of poultry litter. *Id.* at 89:12-91:12. Mr. Thompson testified that the ODEQ has not made a finding that any Poultry Defendant or any poultry grower under contract with a Poultry Defendant has caused pollution of the waters of the state of Oklahoma in the IRW through the management or utilization of poultry litter. Exh. 5, Thompson Dep., 21:22-22:4, 22:12-25. Mr. Peach testified that farmers in the IRW are generally concerned with the environment and generally obey applicable statutes and regulations (Exh. 7, Peach Dep., 95:20-96:3) and that he is not aware of any violation by any Poultry Defendant of any Oklahoma law or regulation in the IRW (*id.* at 96:4-10). The fact that the agencies responsible for regulating the land application of poultry litter and enforcing the regulatory programs that pertain to poultry litter do not recognize the Poultry Defendants or poultry growers under contract with them as violators of such programs certainly lends credence to the Poultry Defendants' position that this lawsuit is not simply "the State's lawsuit."

Presence and Magnitude of Other Potential Sources of Phosphorus and Bacteria in the IRW

Testimony of Mr. Fite, Mr. Thompson, and Mr. Peach further illustrates tension between the views of Oklahoma agencies and Mr. Edmondson regarding the presence of sources of phosphorus and bacteria other than poultry litter which are present in the IRW. Mr. Fite recognizes that factors other than the land application of poultry litter affect water quality in the IRW and would prefer that all significant sources of phosphorus or bacteria be regulated to minimize their water quality impacts. Exh. 6, Fite Dep., 84:4-10, 85:23-86:4, 88:13-89:1. Mr. Thompson recognizes that septic systems, point source discharges, background levels, and commercial fertilizer can have an impact on water quality in the IRW. Exh. 5, Thompson Dep., 92:10-25. Mr. Peach stated that there are many potential sources of nutrients in the waters of the IRW (Exh. 7, Peach Dep., 76:11-19) and that it is not possible to address water quality without addressing all potential sources (*id.* at 76:20-77:2). Such potential sources include stream bank erosion, construction, rural roads, gravel roads, recreation, septic tanks, nurseries, wildlife, cattle, and point sources. *Id.* at 77:3-78:9; 80:8-12. These details support the idea that Mr. Edmondson initiated this lawsuit without the full support of relevant Oklahoma agencies and officials. Such an idea is most certainly relevant in this lawsuit, and the Court should permit the Poultry Defendants to express their position through evidence or through the manner in which they refer to the lawsuit.

The fact that various Oklahoma officials and regulators with responsibilities related to the issues in this case do not view such issues uniformly has been recognized by this Court. During the July 2, 2009 hearing on the Poultry Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, In the Alternative, Motion for Judgment as a Matter of Law Based on Lack of Standing (Dkt. No. 1788), in responding to a comment from counsel

regarding the conflict inherent in the fact that the State of Oklahoma continues during the pendency of this litigation to write nutrient management plans which tell poultry growers and farmers how much poultry litter they can apply to their land in the IRW, the Court stated that "the government doesn't always speak with one voice." Exh. 9, 7/2/09 Hrg. Transcript, 60:19-20.

If granted, the State's Motion would exclude highly probative evidence from this case. The Poultry Defendants do not recognize that Mr. Edmondson has filed this action on behalf of the State. *See* Exh. 6, Fite Dep., 83:10-14 (stating that the lawsuit was not his idea and that the OSRC did not request the filing of the lawsuit); Exh. 5, Thompson Dep., 12:16-18, 25 (stating that no one consulted with him before this lawsuit was filed and that he did not request the filing of the lawsuit); Exh. 7, Peach Dep., 108:18-21 (stating that ODAFF did not request that this lawsuit be brought against the poultry integrators); 84:15-24 (stating that he provided no input in the pre-litigation stage as to how the complaint should be drafted or what the goals of the litigation ought to be); 101:2-5 (stating that he is concerned with the effect this lawsuit could have on the livestock industry). That this lawsuit originated in the attorney general's office, however, is and has always been, an important aspect of the Poultry Defendants' defense. If granted in full, the State's Motion in Limine would be highly prejudicial to the Poultry Defendants.

The State of Oklahoma, through detailed laws and regulations, has condoned and in fact encouraged the long-standing practice of the use of poultry litter as a fertilizer, including on lands located in the IRW. To date, the State has not spoken with one voice on this issue. To preclude the Poultry Defendants from explaining these details and pointing out the contradiction created when one agency regulates and permits an activity while a second agency brings suit

against a group of defendants for allegedly taking part in that same activity would substantially impair the Poultry Defendants during trial and would mislead the jury on the State's role in these matters.

The State further seeks to preclude this evidence under Federal Rule of Evidence 403, arguing that attributing the case to the attorney general is inaccurate and an improper attempt to mischaracterize the lawsuit, personalize the lawsuit, and appeal to bias. The test for Federal Rule of Evidence 403 is whether the alleged "unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence." As noted above, excluding otherwise admissible evidence under Federal Rule of Evidence 403 "is an extraordinary remedy [that] should be used sparingly." The Advisory Committee Notes on Federal Rule of Evidence 403 offer insight on the district court's analysis: "In reaching a decision on grounds of unfair prejudice, consideration should be given to the probative effectiveness of a limiting instruction." Such an instruction would remedy any perceived bias resulting from the Poultry Defendants referring to the role of the attorney general in this action. As an example, this Court's previous ruling, quoted in the State's Motion in Limine, could serve as a proper instruction:

[T]he Attorney General is listed in the caption of this action solely because he is bringing the action on behalf of the State of Oklahoma. As such, the true party is the State of Oklahoma, not the Attorney General. This lawsuit is styled "ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma." The state, not the Attorney General is the real party in interest and is the Plaintiff in this action.

If this instruction is given before any evidence is put before the jury, any reference by the Poultry Defendants that the attorney general's office instigated the lawsuit will be made in a proper context and any potential for bias will be eliminated. A proper understanding of the role of the attorney general's office in this litigation will help the jury understand the State's historical and current actions and varied positions regarding the land application of poultry litter

and will remedy rather than increase the jury's confusion over the issues involved in this case. The Poultry Defendants will refer to this lawsuit as one brought by the attorney general on behalf of the State. That is a legal and valid description of the case and should not be forbidden by the granting of an overbroad Motion in Limine.

WHEREFORE, Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George's, Inc., George's Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc, respectfully ask the Court to deny the State of Oklahoma's Motion in Limine to Preclude Defendants From Referring to This Action as Anything Other than "The State's" Lawsuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 20th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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